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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JEFFREY C. BROWN, as Trustee etc.,

Plaintiff and Respondent,

v.

KENNETH NOEL MARINOS,

Defendant and Appellant.

B207361

(Los Angeles County  
Super. Ct. No. SC 085730)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph S. Biderman, Judge. Affirmed.

Kenneth Noel Marinos, in pro. per., for Defendant and Appellant.

Hathaway, Perrett, Webster, Powers, Chrisman & Gutierrez, Michael F. Perrett and Greg W. Jones for Plaintiff and Respondent.

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In our previous nonpublished opinion in this case, *Brown v. Marinos*, B194647, filed August 20, 2007 (*Brown I*), we remanded with directions to allow appellant Kenneth Noel Marinos to amend his cross-complaint against respondent Jeffrey C. Brown, the trustee under two trusts involving the Marinos family. Appellant failed to effectively amend the cross-complaint and the trial court sustained respondent's demurrer without leave to amend. We affirm.

### PROCEDURAL HISTORY

The lengthy and somewhat complicated background of this case has been stated in our previous opinion. It is not necessary to repeat the entirety of that history. The gist of the matter is that Helen W. Marinos, appellant's mother, restructured her substantial estate in 1994/95 much to appellant's detriment, and that appellant seeks to return to a disposition of the estate Helen<sup>1</sup> made in 1992 that was much more favorable to him and his brother Daniel Marinos.

Central to the final disposition of Helen's estate is the substituted judgment that was entered by the trial court in January 1996.<sup>2</sup> This judgment was entered following an omnibus petition filed by respondent that sought court approval to revoke all previous exercises of the power of appointment and also sought approval of the appointment of Helen's estate to the Helen W. Marinos Charitable Foundation. Although these changes in Helen's testamentary dispositions effectively set aside a trust under which appellant and his brother Daniel would have enjoyed 6 percent of the assets of Helen's estate<sup>3</sup> for a period of 10 years,<sup>4</sup> Helen's last will and testament, executed in November 1994, had already

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<sup>1</sup> We refer to Helen by her first name for clarity's sake and intend no disrespect thereby.

<sup>2</sup> The doctrine of substituted judgment permits a court to authorize a variety of actions that a conservatee would have undertaken if he or she had been competent to act. This doctrine, judicially created, is now enacted in Probate Code section 2580 et seq. (14 Witkin, Summary of Cal. Law (10th ed. 2005) Wills and Probate, § 1025, pp. 1140-1141.)

<sup>3</sup> Helen's estate was valued at \$4.9 million.

<sup>4</sup> This was the plan under Helen's 1992 testamentary disposition.

accomplished the same result. In that will Helen stated that she had already provided for her adopted sons Kenneth and Daniel by naming them as the beneficiaries of an irrevocable insurance trust. Although appellant received notice of the hearing that led to the substituted judgment,<sup>5</sup> we held in *Brown I* that the trial court's order dispensing with the requirement of notice was correct.

We pick up the thread of the story with the filing of a quiet title action by respondent in June 2005 that was intended to clear the title to the Chart House property located on Pacific Coast Highway in Malibu. The earnings of the restaurant located on this property were divided over the years since 1946 between the brothers Harry and Chris Marinos, the latter being Helen's husband, and their sister Mary Naegeli; all these individuals are deceased.

The cross-complaint that was the subject of our opinion in *Brown I*, and that is also the subject of the instant proceedings, was filed by appellant in the quiet title action on April 2006. In substance, the cross-complaint seeks an order granting appellant an interest in the Chart House property and it also seeks to reinstate Helen's testamentary dispositions of 1992.

We held in *Brown I* that appellant's cross-complaint is an independent action to set aside the substituted judgment and that the issue in this action is limited to whether the substituted judgment was tainted by extrinsic fraud or mistake. We laid down a number of holdings as the law of the case, the first of which was that the substituted judgment was not subject to collateral attack. As we explained in *Brown I*: "This means that appellant is barred from contending that the substituted judgment is erroneous, either in fact or law, and should therefore be set aside." (*Brown I, supra*, B194647 [at p. 9].)

We also held in *Brown I* that because the relief that appellant was seeking was a reinstatement of Helen's testamentary dispositions as of 1992, "appellant must allege and, at the appropriate time, prove that his participation in the proceedings leading to the substituted judgment would have led to the result and the relief that he now seeks. Given

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<sup>5</sup> Notice was by mail, served on appellant at the Ventura County Jail.

that by 1994 Helen had substantially restructured her estate and her testamentary dispositions, this is a heavy burden.” (*Brown I, supra*, B194647 [at p. 10].)

We also explained in *Brown I* the limits and contours of the doctrine of extrinsic fraud and mistake. We pointed out that the doctrine of extrinsic fraud/mistake covers not only “situations when there was no notice of the proceedings (and hence no participation)” but it also covers “situations where a party, even though present during the proceedings, was fraudulently kept in the dark as to a claim or defense.” (*Brown I, supra*, B194647 [at p. 7].) The paradigm of extrinsic fraud or mistake is “where a party was prevented from learning about the proceedings, did not attend the proceedings and was therefore deprived of its day in court.” (*Ibid.*)

While we found in *Brown I* that appellant’s cross-complaint did not explicitly allege extrinsic fraud as that concept is properly understood and that the cross-complaint was therefore vulnerable to respondent’s demurrer, we held that leave should have been granted to amend the complaint to allege extrinsic fraud or mistake, i.e., we found that the trial court should not have sustained respondent’s demurrer to the original cross-complaint without leave to amend.

## **DISCUSSION**

The first amended cross-complaint, filed after our decision in *Brown I*, sets forth under the caption “EXTRINSIC FRAUD OR EXTRINSIC MISTAKE IMPROPERLY PRECLUDED PRESENTATION OF THE FULL CASE IN THE SUBSTITUTED JUDGMENT PROCEEDINGS” (boldface omitted) the following allegations: Respondent did not have the power to file the petition for the substituted judgment that we have discussed above; respondent failed to inform the trial court that he lacked the power to file that petition; Helen, respondent and others “took affirmative steps” to prevent the trial court from learning that respondent did not have the power to file the petition; respondent and Helen unsuccessfully tried to persuade the Bank of America to cooperate with respondent’s “scheme to obtain control of the Marinos family fortune”; and Helen and respondent threatened the Bank of America with legal action and did so in order to prevent the trial court from learning that respondent lacked the power to file the petition for a substituted

judgment. The contention that respondent lacked the power to file the petition for a substituted judgment is predicated on the claim that Helen's 1992 testamentary disposition deprived respondent of the power to file the petition.

The foregoing allegations constitute neither extrinsic fraud nor extrinsic mistake. None of these allegations come close to stating that appellant was fraudulently, or as a result of excusable neglect, prevented from participating in the substituted judgment proceedings. "The most common ground for equitable relief is extrinsic fraud, a broad concept that covers a number of situations. Its essential characteristic is that it has the effect of preventing a fair adversary hearing, the aggrieved party being deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting that party's claim or defense. [Citations.]" (8 Witkin, Cal. Procedure (5th ed. 2008) § 225, p. 832.) "In some cases, however, the ground of relief is not so much the fraud or other misconduct of the defendant as it is the excusable neglect of the plaintiff to appear and present a claim or defense. If neglect results in an unjust judgment, *without a fair adversary hearing*, a basis for equitable relief is present, and is often called 'extrinsic mistake.' [Citations.]" (8 Witkin, *supra*, § 230, p. 840.)

Construing the allegations of the first amended cross-complaint most favorably to appellant, at most the allegations amount to the claim that the trial court erred as a matter of law in entertaining the petition for a substituted judgment. But, as we pointed out in *Brown I*, the substituted judgment is not subject to collateral attack on the ground that it is legally erroneous. "'If a judgment, no matter how erroneous, is within the jurisdiction of the court, it can only be reviewed and corrected by one of the established methods of direct attack.'" (*People v. \$6,500 U.S. Currency* (1989) 215 Cal.App.3d 1542, 1548.)

We provided appellant with explicit guidelines in *Brown I* for an effective amendment of the cross-complaint. Despite those clear guidelines, appellant has failed to allege any facts constituting extrinsic fraud or mistake.

We cannot agree with appellant's claim, advanced in his opening brief wherein he appears in propria persona, that his counsel at the time of the preparation and filing of the first amended complaint was not competent because he failed to "follow the road map that

this Court laid out” in *Brown I*. This is a case where the inference is “natural and reasonable” that appellant’s failure to effectively amend the cross-complaint “arose from the want of facts rather than from lack of skill in stating them.” (*Loeffler v. Wright* (1910) 13 Cal.App. 224, 232.) Counsel faced the serious obstacle that appellant received notice of the substituted judgment proceedings and that it was appellant’s decision not to participate in those proceedings. It also appears that appellant was unable to allege that his participation in the substituted judgment proceedings would have made any difference. This is not surprising as Helen had substantially restructured her estate and testamentary disposition in 1994, prior to the substituted judgment proceedings. Finally, the theory that the 1992 testamentary dispositions deprived Helen of the power to make changes in those dispositions at a later time, i.e., in 1994/95, is simply untenable. Given these difficulties, it is not surprising that counsel was unable to effectively amend the cross-complaint.

It is manifest that appellant is unable to plead either extrinsic fraud or mistake. Accordingly, it was not error to sustain the demurrer without leave to amend.

#### **DISPOSITION**

The judgment is affirmed. Respondent is to recover his costs on appeal.

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FLIER, Acting P. J.

We concur:

BIGELOW, J.

O’NEILL, J.\*

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\* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.